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In the Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM GRAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument:	
I. The warrant sufficiently stated the particular grounds or probable cause for its issue	5
II. The affidavits established probable cause for believing that petitioner's dwelling was "being used for the unlawful sale of intoxicating liquor"	10
Conclusion	17

CITATIONS

Cases:	
Dumbra v. *United States*, 268 U. S. 435	12, 14
Giles v. *United States*, 284 Fed. 208	9
Johnson v. *United States*, 46 F. (2d) 7	6, 7
Kasprowicz v. *United States*, 20 F. (2d) 506	13
Maccieno v. *United States*, 270 U. S. 629	10, 16
Murby v. *United States*, 293 Fed. 849	7
Nordelli v. *United States*, 24 F (2d) 665	7
Reisgo v. *United States*, 285 Fed. 740	7
Rose v. *United States*, 274 Fed. 245, certiorari denied, 257 U. S. 655	7
Simmons v. *United States*, 18 F. (2d) 85	15
United States v. *Berger*, 22 F. (2d) 867	13
United States v. *Callahan*, 17 F. (2d) 937	6, 7
United States v. *Gaitan*, 4 F. (2d) 848	7
United States v. *Kaplan*, 286 Fed. 963	7
United States v. *Kraus*, 270 Fed. 578	7
United States v. *Lepper*, 288 Fed. 136, affirmed, *sub nom. Lepper* v. *United States*, 295 Fed. 1017	14
United States v. *Vottiero*, 25 F. (2d) 346	13

Statutes:

	Page
Espionage Act of June 15, 1917, c. 30, Title XI, 40 Stat. 217, 228—	
Section 3 (U. S. C., Title 18, sec. 613)	2
Section 4 (U. S. C., Title 18, sec. 614)	2
Section 5 (U. S. C., Title 18, sec. 615)	2
Section 6 (U. S. C., Title 18, sec. 616)	3
Section 10 (U. S. C., Title 18, sec. 620)	6
Section 12 (U. S. C., Title 18, sec. 622)	7
Section 13 (U. S. C., Title 18, sec. 623)	7
National Prohibition Act, c. 85, Title II, sec. 25, 41 Stat. 305, 315 (U. S. C., Title 27, sec. 39)	3

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 29–32) is reported in 56 F. (2d) 779.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1932. (R. 29.) The petition for certiorari was filed April 21, 1932. The jurisdiction of this Court is revoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the search warrant, pursuant to which petitioner's dwelling was searched and liquor and property designed for its manufacture seized, was void, it being contended by the petitioner (1) that the warrant failed to state the particular grounds or probable cause for its issue, and (2) that the affidavits upon which it was issued were insufficient in that they failed to allege facts showing that intoxicating liquor had been sold on the premises to be searched.

STATUTES INVOLVED

Title XI of the Act of June 15, 1917, c. 30, 40 Stat. 217, 228 (U. S. C., Title 18, Secs. 613–616), commonly known as the Espionage Act, contains the following provisions:

> SEC. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.
>
> SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.
>
> SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

> SEC. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39), provides in part:

> A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. * * * No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of Kentucky upon two counts, the first of which charged him with unlawfully manufacturing intoxicating liquor in an amount in excess of one gallon and not as a casual employee only, and the second with possessing property designed for the manufacture of intoxicating liquor intended for use in violation of the National Prohibition Act. (R. 1–2.) Before trial he filed a petition to quash a search warrant which had issued to search certain premises occupied by him as a dwelling, and to suppress all evidence obtained in the execution of the warrant, on the ground that the warrant was void because (1) it failed to state the particular grounds or probable cause for its issuance, as required by Section 6, Title XI, of the Act of June 15, 1917 (*supra*, p. 3), and because (2) the affidavits upon which the warrant issued failed to show that the premises sought to be searched were used for the unlawful sale of intoxicating liquor, as required by Section 25, Title II, of the National Prohibition Act (*supra*, p. 3). (R. 4–16.)

The petition to quash was overruled and an exception noted. (R. 4.) At the trial an objection was made to the introduction of the evidence secured on the search of the petitioner's dwelling on the ground that it had been illegally obtained, but this objection was overruled (R. 25), as was also a motion, on like ground, for a directed

verdict at the close of the Government's case (R. 26.) Exceptions were taken to these rulings.

At the trial the Government called as witnesses three Federal prohibition officers, who testified that they had searched the petitioner's home under authority of a search warrant and had found and seized one 200-gallon still, thirty-two 50-gallon fermenters, 1,600 gallons of still beer, 350 gallons of whisky, one 50-gallon copper whisky tank, 200 empty gallon cans, 12 gas burners, 2 electric motors, and 100 feet of rubber hose. (R. 25–26.) No testimony was offered by the defense. (R. 26.)

The jury returned a general verdict of guilty (R. 17), and petitioner was sentenced to imprisonment for five years (R. 20). The judgment was affirmed by the Circuit Court of Appeals. (R. 29.)

ARGUMENT

I

THE WARRANT SUFFICIENTLY STATED THE PARTICULAR GROUNDS OR PROBABLE CAUSE FOR ITS ISSUE

The warrant in question appears at pages 12–14 of the record. It describes particularly the "place to be searched" (R. 14) and the "things to be seized" (R. 13), and therefore meets the two requirements as to the contents of a search warrant specified in the Fourth Amendment. But the petitioner contends that the warrant is defective because it does not state the particular grounds or probable cause for its issue as provided in Section 6 of the Espionage Act (*supra*, p. 3), which is made applicable by Section 25, Title II, of the National

Prohibition Act (*supra,* p. 3). His principal argument is that a warrant does not comply with Section 6 unless it repeats the *facts* stated in the affidavit pursuant to which the warrant issues.

Preliminarily, it may be pointed out that, although Section 6 is couched in language imperative in form, so also are other provisions of the Espionage Act with respect to the issuance and execution of search warrants. But such provisions have almost uniformly been held to be merely directory and not mandatory. Thus, although Section 10 provides that—

> The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night,

it has been held that a failure to direct whether the warrant should be served in the daytime or nighttime did not invalidate the warrant where it appeared that the search was actually made in the daytime (*Johnson* v. *United States,* 46 F. (2d) 7, 9 (C. C. A. 9th)); and, where the affidavits were not positive that the property to be seized was in the place to be searched, a direction in the warrant to conduct the search at any time of the day or night was held not fatal to the validity of the warrant, it appearing that the search was in fact made in the daytime (*United States* v. *Callahan,* 17 F. (2d) 937,

940–941 (M. D. Pa.)). So, also, although Section 12 positively directs the officer seizing property under a search warrant to give a copy of the warrant to the person from whom the property is taken, his failure to do so has been held to constitute the mere omission of a ministerial duty which does not affect the validity of the search (*Johnson* v. *United States, supra* (p. 9); *United States* v. *Kaplan,* 286 Fed. 963, 971 (S. D. Ga.); *United States* v. *Gaitan,* 4 F. (2d) 848, 851 (S. D. Cal.); but see *Murby* v. *United States,* 293 Fed. 849 (C. C. A. 1st)); and the failure to make a verified return of the warrant, commanded by Section 13, has likewise been deemed insufficient to invalidate the search (*United States* v. *Kraus,* 270 Fed. 578, 582 (S. D. N. Y.); *Rose* v. *United States,* 274 Fed. 245, 250–251 (C. C. A. 6th); *Reisgo* v. *United States,* 285 Fed. 740, 741 (C. C. A. 5th); *United States* v. *Callahan, supra* (pp. 941–972); *Nordelli* v. *United States,* 24 F. (2d) 665, 666, 667 (C. C. A. 9th)).

The Espionage Act was undoubtedly enacted as a regulatory measure to bring about greater precision in the issuance and execution of search warrants, but it seems unlikely that Congress intended by that Act to invalidate a search made pursuant to a warrant, valid under the Fourth Amendment, unless there is some showing that the person whose premises have been searched and property seized has been prejudiced by the failure to comply with the statute. The warrant here involved informed the petitioner that affidavits had been filed with the

commissioner alleging that "intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold" upon the premises, and that upon examination of the complaining witnesses under oath the commissioner had found that probable cause had been shown that the property was being used for the "unlawful manufacture, possession and sale of intoxicating liquor." No attempt was made by the petitioner to show that he was in any way prejudiced by the failure of the warrant to state all the facts set forth in the affidavits. The affidavits were on file with the commissioner and doubtless were open to petitioner's inspection.

But assuming that the language of Section 6 is mandatory, we submit that it was complied with. Section 5 of the statute (*supra,* p. 2), with which Section 6 is in *pari materia,* provides that "the affidavits or depositions must set forth the *facts* tending to establish the *grounds* of the application or probable cause for believing that they exist." (Italics ours.) Obviously the "grounds" and the "facts" are not, as petitioner contends, synonymous. The "particular grounds" referred to in Section 6 are clearly those referred to in Section 5 as the grounds which the *facts* must tend to establish. Accordingly the words "particular grounds" in Section 6 would seem to comprehend merely a statement of the offenses which it is charged are being committed on the premises. If the warrant

states these offenses, or that there is probable cause for believing that they are being committed, it states, we submit, the "particular grounds or probable cause for its issue," as required by Section 6.

The purpose of the statutory requirement was to inform the person whose premises are to be searched of the mission of the searching party. While the warrant in the instant case is loosely phrased, it adequately informed the petitioner of the charge that his dwelling house was being used for the unlawful sale of intoxicating liquor—a permissible ground for search under Section 25, Title II, of the National Prohibition Act. (*Supra*, p. 3.)

Petitioner cites *Giles* v. *United States*, 284 Fed. 208 (C. C. A. 1st) as in conflict with the decision of the court below. (Br. p. 23.) While the court there stated that a recital in a warrant substantially similar to that involved in the instant case did not comply with the requirements of Section 6, the case cited loses some of its weight as an authority opposed to the case at bar by reason of the fact that the warrant there involved was also declared to be defective in a number of other respects. Whether the court would have regarded the defect in question as fatal if it had been the only one involved is, of course, a matter of surmise. But assuming that the cases are in conflict, we do not believe that the conflict is one which requires the exercise by this Court of its supervisory power of review. The only

effect of the *Giles* decision is to require officers issuing warrants in the First Circuit to make a fuller statement than the statute calls for. This is not a serious administrative burden on such officers. The *Giles* case was decided ten years ago, and it will be time enough to review the question if in the future the Circuit Court of Appeals for the First Circuit should hold invalid a warrant meeting the requirement of the statute.

Petitioner also cites *Maccieno* v. *United States,* 270 U. S. 629. In that case this Court granted certiorari and reversed the judgment below upon confession of error by the Government. But it appears from the memorandum filed on behalf of the Government in that case (pp. 3–4) that, so far as the warrant in controversy was concerned, the Government's confession of error was based upon the ground that "there is no description of the property to be seized; in fact, there is no direction to seize any property, merely to investigate and search into and concerning certain violations of law." The case is, therefore, not in point.

II

THE AFFIDAVITS ESTABLISHED PROBABLE CAUSE FOR BELIEVING THAT PETITIONER'S DWELLING WAS "BEING USED FOR THE UNLAWFUL SALE OF INTOXICATING LIQUOR."

Section 25, Title II, of the National Prohibition Act provides that "No search warrant shall issue to search any private dwelling occupied as such

unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose," etc. Since concededly the premises in question were a dwelling house and since, so far as the facts alleged in the affidavits are concerned, it is not asserted that the premises were used in part for business purposes, the question presented is whether the affidavits upon which the warrant was based showed probable cause for believing that the premises were "being used for the unlawful sale of intoxicating liquor."

The affidavit of Agent Curtis [1] contained the following recitals (R. 15):

> Now comes F. M. Curtis, P. A., and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.

---

[1] Two affidavits were presented to the Commissioner who issued the warrant. One of them, that by Agent Sandlin, may be disregarded, as it refers to the affidavit of Agent Curtis for the facts supporting the charges that the premises were used for the unlawful possession, manufacture, and sale of intoxicating liquor.

Petitioner contends that this affidavit is insufficient because it does not show any actual sales of liquor upon the premises. (Br. 26.)

Inherent in this contention are two untenable assumptions. The first is that the warrant may not issue until sale has been actually proved. This ignores completely the correct concept of probable cause. As this Court said in *Dumbra* v. *United States,* 268 U. S. 435, 441:

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

The second erroneous assumption is that Section 25, Title II, of the National Prohibition Act requires a showing of probable cause that liquor is being *sold on the premises.* But the Act merely says that the warrant shall not issue unless the dwelling "is being used for the unlawful sale of intoxicating liquor." This provision is satisfied, we believe, by a showing of probable cause for belief that the dwelling is being used for the purpose of

effecting the sale of liquor, *whether such sale is consummated there or elsewhere.* Such a construction of the statute meets the mandate of Section 3 of Title II that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," and finds support not only in the decisions of the court below in the instant case and in *Kasprowicz* v. *United States,* 20 F. (2d) 506 (C. C. A. 6th), but also in *United States* v. *Berger,* 22 F. (2d) 867 (D. Mass.), and *United States* v. *Vottiero,* 25 F. (2d) 346, 347 (S. D. N. Y.). In the *Berger* case the court said (p. 867):

> The language of the statute, "used for unlawful sale," might upon a strict construction be held to refer only to sales completed in the dwelling. But the expression has also a wider signification and may mean "used in the business of selling liquor unlawfully," as the basement of a shop may be said to be used for selling goods, though no contracts of sale are made there. This interpretation of the statute gives to its expression "for the sale" a meaning equivalent to "in connection with the sale." * * *
>
> Taken as a whole, the act shows a clear and firm intent that the homes of people who are not commercializing liquor shall not be invaded by search warrants, and per contra an equally clear intent that where commercialism is present search warrants may be used to suppress the illegal business. In

> *Kasprowicz* v. *U. S.*, 20 F. (2d) 506 (C. C. A. 6th), evidence that several automobiles were observed over a period of several days taking away from a dwelling house what appeared to be intoxicating liquor, was held to justify the issue of a search warrant for it, on the ground "that the dwelling was being used for 'the purpose of sale.'" Denison, J., at page 507. Considering the general intent of the act and its provisions for liberal construction above quoted, I think that the expression "used 'for unlawful sale of intoxicating liquor'" should be interpreted as meaning used in the business of selling liquor unlawfully.
>
> It follows that a dwelling used to manufacture liquor, which is either sold there or taken thence for sale, is subject to search under the act.

The affidavit in this case (*supra*, p. 11) is admittedly not a well-drawn document. It is doubtful if the facts therein recited were sufficient to show probable cause that liquor was being sold upon the premises. (Cf., however, *United States* v. *Lepper*, 288 Fed. 136, 138–139, affirmed in open court *sub nom. Lepper* v. *United States*, 295 Fed. 1017 (C. C. A. 2d).) But we submit that under the test established in the *Dumbra* case, *supra*, the affidavit was entirely adequate to establish probable cause for believing that the dwelling house was being used as a headquarters for the merchandising of liquor. As the court below said (R. 31):

> One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whiskey so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. * * *

This showing, we contend, was a sufficient compliance with Section 25.

There is nothing in *Simmons* v. *United States,* 18 F. (2d) 85 (C. C. A. 8th), cited by petitioner, which militates against our position. There the affidavit purported to allege the sale of liquor on the premises sought to be searched. The court held that the affidavit was not sufficient because it did not state facts within the personal knowledge of the affiant but rested rather upon mere beliefs and suspicions. While there is language in the opinion which conceivably may be interpreted as requiring that the affidavit must show either actual sales or that the affiant had personal knowledge of such sales, the idea which the court undoubtedly meant to convey was that an affidavit, where it purports to charge sale upon the premises, must show either actual sales thereon or state such facts within the personal knowledge of the affiant as would lead a reasonable and prudent man to believe that liquor was being there sold. We do not believe that a conflict can be predicated upon the *Simmons* decision.

The petitioner also cites the *Maccieno* case, *supra,* as to the sufficiency of the affidavit. The affidavit there involved simply stated that the agent had investigated the premises in question and found "that all of the same are used in part or solely for the unlawful possession and sale of liquor." The Government confessed that this affidavit was inadequate because (memorandum, p. 5) "No facts whatever are set forth, merely the bald conclusion of the prohibition officer * * *." This is obviously not the situation in the instant case. The comments of the Solicitor General in the Government's memorandum in the *Maccieno* case, quoted at the bottom of page 31 of the petitioner's brief, with reference to the testimony of the agent, were contained in a paragraph the object of which was expressed in its first sentence, "Besides being defective, the affidavit was untrue." The paragraph then proceeds to show in what respects the affidavit was untrue, and concludes with the statement quoted by the petitioner. It seems clear that the mind of the Solicitor General was not at that moment directed to what it is necessary to show as a prerequisite to the issuance of a warrant.

CONCLUSION

We believe that the case was correctly decided. There is no such conflict of decisions as would warrant this Court in exercising its supervisory power of review at this time. The petition should be denied.

Respectfully submitted.

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